No. 3543

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. A. CZIZEK,
Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a corporation),
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR
on Motion to Amend Judgment.

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The effect of all the cases cited in the Brief of Plaintiff in Error on the motion to amend the judgment is that where the cause is tried by the court upon an *agreed statement* of facts or where the court has made *special findings* of fact, this court may direct the entry of such judgment as under the law should have been entered thereon. This rule, however, does not apply where, as in this case, there was no special finding or agreed statement. See Lehmen v. Dickson, 148 U. S. 71, hereafter referred to. Here there was a general finding in favor of the defendant (Tr. p. 112). This is

the equivalent of a finding of fact against the plaintiff and in favor of the defendant upon all the issues made by the pleadings. One of these issues involved the question whether the plaintiff, had he been minded to accept the offer, could have delivered the stock at Boise while the alleged purchaser was able to buy. The court said in its opinion (Tr. p. 41):

> "It involves the question whether he would or would not have embraced the opportunity of which the telegram was intended to advise him, and, if so, whether he *could* and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good."

Plaintiff alleged in his complaint that Miller was ready and willing to buy the stock, and plaintiff was ready and willing to sell the same, and that if the telegram had been delivered he would have sold the stock (Par. VIII of Complaint, Tr. p. 10). In paragraph VIII of the answer (Tr. pp. 17 and 18), these allegations are denied.

The evidence is that the stock was held by a bank in Oakland, California, as collateral for a debt due from the plaintiff. The message in suit, being a night letter, was filed at Boise, Idaho, Friday, November 30th. It should have been delivered Saturday morning, Dec. 1st. It was problematical whether plaintiff could have secured the release of the stock before the closing of the bank at noon of Saturday, and there was no evidence that he

could have done so. If the stock had not been mailed to Boise before Monday, December 3d, it would not have reached Boise until after Miller's account there was overdrawn (see Tr. p. 94). The cashier testified "At the close of business on the 5th of December Mr. Miller's account shows an overdraft of $20,978.76".

The general finding for the defendant is tantamount to a finding that plaintiff could not have delivered the stock at Boise in time to have effected the sale. The court was of the opinion "that the evidence is insufficient to support a finding * * * that he (plaintiff) could have or would have delivered the stock, which was held in a San Francisco bank as collateral while Miller was willing and able to keep his offer good" (Tr. p. 111).

Counsel for plaintiff in error contend that this was clearly a matter of law, but we urge that the question whether, under the evidence, the plaintiff could have delivered the stock while Miller was ready and able to buy is a question of *fact* which this court will not assume to determine. While there may be no conflict in the testimony upon this point, the credibility of the witnesses is addressed to the trial court.

If the court below had made a special finding in favor of the defendant upon the above issue as to the plaintiff's ability to deliver the stock and Miller's ability to buy, this court would not direct the entry of judgment for the plaintiff. The gen-

eral finding, however, which the court did make has the same effect, and therefore this court is without power to grant the motion here made.

The counsel for plaintiff in error seem to treat the opinion of the court as a special finding, which we have shown in our petition for rehearing cannot be so construed. Upon this point and upon the further question of the distinction between the power of the Court of Appeal in cases where there is a *general finding,* and those where there is an agreed statement or special finding of fact, we respectfully ask the court to review the case of

> Lehmen v. Dickson, 148 U. S. 71; 37 L. ed. 373.

The court says:

> "There is no special findings of facts and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and rulings, if any be preserved on questions of law arising during the trial."

Also, see page 77:

> "To obviate the objection that there is no finding of facts, or agreed statement thereof, counsel for plaintiff in error insists that there is really no dispute as to the facts, no conflict in the testimony as to any substantial question, the only difference being as to a subordinate and unimportant matter, and that, therefore, it is the same as though the facts had been agreed upon or found. Further, they suggest that in the opinion delivered by the trial judge there is a narration of the facts

> we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal questions: 'Thayer, *District Judge,* after stating the facts as above', and claim that such statement is equivalent to a finding of the facts as previously recited.
>
> But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

See, also,

Wilson v. Merchants Loan & Trust Co., 183 U. S. 123,

and

Packer v. Whittier, 91 Fed. 511.

We rest our opposition to this motion on the point that where there is no agreed statement or special findings, as in the cases cited by the plaintiff in error, but only a general finding in favor of the defendant on issues of fact, made by the plead-

ings, the Court of Appeal will not make new findings of fact or direct the entry of judgment for the plaintiff.

Dated, San Francisco,
May 12, 1921.

Respectfully submitted,

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